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Case No. _____

IN THE

Supreme Court Of The United States

October Term, 1994

WILLIAM EUGENE RUTLEDGE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether Eleventh Circuit Local Rule 36-1, both on its face and as applied in this case, violates the Due Process and Equal Protection Clauses of the United States Constitution by authorizing panels of the Eleventh Circuit to affirm all criminal convictions merely by determining that the evidence is sufficient to support the jury verdict and that a written opinion would have no precedential value, including those cases, such as the instant one, which raise claims of Constitutional errors which require *per se* reversal ?

(2) Whether there is a split of authority among the courts of appeal, represented by the difference between Eleventh Circuit Local Rule 36-1 and the local rules of all of the other courts of appeal, as to the authority of a court of appeals to use its local rule making power to create substantive grounds for the affirmance of criminal convictions?

(3) Whether Eleventh Circuit Local Rule 36-1 conflicts with Rule 52, Federal Rules of Criminal Procedure, and 28 U.S.C. § 2111, in that it makes all errors except insufficiency of the evidence to support the jury verdict "harmless error", regardless of whether there are Constitutional errors which require *per se* reversal, and further violates the prohibitions of 28 U.S.C. §§ 2071 and 2072(b) against the use of the local rule making power to establish rules in conflict with the rules prescribed by this Court or that "abridge" and "modify" substantive rights of parties?

(4) Whether in response to a *Batson objection* made in a criminal case, prosecutors fail as a matter of law to articulate a race-neutral reason for peremptorily challenging blacks where the articulated reason is based on attributes of the challenged blacks which are equally applicable to whites who were not peremptorily challenged by the

prosecution and the prosecution offers no explanation for applying the articulated attributes to the blacks and not to the whites?

(5) Whether a district judge in deciding a *Batson* objection made in a criminal case is required to hold a hearing and make findings of fact as to why the facially comparable attributes articulated by the prosecution as racially neutral reasons for peremptorily challenging blacks were not applied to whites who were not peremptorily challenged?

(6) Whether a prosecutor in attempting to articulate a racially neutral reason for peremptorily challenging a black woman can as a matter of law meet the required standard by comparing her business and supervisory experience to that of white male jurors in view of the historical discriminatory exclusion of black women because of their race and sex from the opportunity to obtain significant business and supervisory experience?

(7) Whether Petitioner, a trial lawyer with twenty-nine years of experience who represented himself *pro se*, was denied a fair trial where at the hearing at which he made the decision to defend himself the district judge promised he would treat Petitioner acting *pro se* "just like any other lawyer, any other defendant", when in fact the district judge had a long standing bias and prejudice against Petitioner based on the trial judge's subjective view of Petitioner's trial tactics over his twenty-nine year career as a trial lawyer and as a result of this bias and prejudice made throughout the trial erroneous prejudicial rulings against Petitioner?

(8) Whether Petitioner's motion to recuse the trial judge should have been granted where the trial judge's bias and prejudice against Petitioner based on the trial judge's bad opinion of Petitioner's trial tactics over a twenty-nine year period made "fair judgment impossible"

within the meaning of *Litkey v. United States* where the trial judge made prejudicial rulings against the Petitioner who defended himself *pro se* after the trial judge concealed his bias and prejudice against Petitioner by failing to disclose that bias and prejudice prior to the first day of trial and by promising Petitioner if he defended himself he would treat Petitioner "just like any other lawyer, any other defendant"?

(9) Whether a peremptory challenge by the prosecution of a minority woman who is a prospective juror in a criminal case should when challenged under *Batson v. Kentucky* or *J.E.B. v. Alabama ex rel. T.B.* impose upon the prosecution the burden of showing that the motivation for the peremptory challenge was neither race nor gender based *and* that the peremptory challenge *was* not based upon attributes which minority women have been historically prevented from obtaining on the same basis as whites or males as a result of race and gender discrimination?

(10) Whether the repeated amendment of the indictment in this case by the introduction of evidence to support prosecution theories of the defendant's guilt not included in the indictment charges is *per se* reversible error?

LIST OF PARTIES

The parties in this case in the Court of Appeals were as follows:

GLENN MARSHALL CONNER, Attorney for United States Steelworkers, AFL-CIO-CLC, Non-Party Intervenor;

STEWART DUDLEY, an individual and Dudley, Hopton-Jones, Sims and Freeman, Accounting Firm, Non-Party Intervenors;

DUDLEY, HOPTON-JONES, SIMS AND FREEMAN, Accounting Firm, Non-Party Intervenors;

ROBERT M. GIRARDEAU, Attorney for Stewart Dudley, an individual and Dudley, Hopton-Jones, Sims and Freeman, Accounting Firm, Non-Party Intervenors;

JOHN L. GOODEN, Non-Party Intervenor;

HERBERT H. HENRY, III, Assistant United States Attorney, and the attorneys working for or with the United States Attorney's Office, Attorneys for Plaintiff-Appellee;

JOE JARVIS, Non-Party Intervenor;

G. DOUGLAS JONES, Attorney for Defendant-Appellant;

JOHN PAT MEADOWS, Assistant United States Attorney, and the attorneys working for or with the United States Attorney's Office, Attorneys for Plaintiff-Appellee;

EDWIN NELSON, United States District Judge;

WILLIAM EUGENE RUTLEDGE, Defendant-Appellant;

JACK W. SELDEN, United States Attorney,and the attorneys working for or with the United States Attorney's Office, Attorneys for Plaintiff-Appellee;

RUSSELL SMECK, Non-Party Intervenor;

ORVIL E. SWORD, Non-Party Intervenor;

UNITED STATES OF AMERICA, Plaintiff-Appellee;

UNITED STATES STEEL WORKERS OF AMERICA, AFL-CIO-CLC, Non-Party Intervenors;

ROBERT L. WIGGINS, JR., and the attorneys working for or with the firm of Gordon, Silberman, Wiggins and Childs, Attorneys for Plaintiff-Appellant.

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JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). A panel of the Eleventh Circuit on March 30, 1994, entered a per curium affirmance without written opinion, citing only Eleventh Circuit Rule 36-1. Appendix A. Petitioner timely filed a Petition For Rehearing and Suggestion of En Banc Rehearing, which was denied on June 2, 1994. Appendix B.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The following is a list of local rules of the courts of appeal involved in this appeal, all of which are reproduced in Appendix C: District of Columbia Circuit Local rule 14(c); First Circuit Local Rule 36.1; Second Circuit Local Rule 0.23; Third Circuit Internal Operating Procedure 5.1.2; Fourth Circuit Internal Operating Procedure 36.3; Fifth Circuit Local Rule 47.6; Sixth Circuit Local Rule 19; Seventh Circuit Local Rule 53; Eighth Circuit Local Rule 47B; Ninth Circuit Local Rule 36-2; Tenth Circuit Local Rule 36.1.

The following is a list of statutes involved in this appeal, all of which are reproduced in Appendix D: 18 U.S.C. § 664; 18 U.S.C. § 1027; 28 U.S.C. § 331; 28 U.S.C. § 1014; 28 U.S.C. § 1254(1); 28 U.S.C. § 2071; 28 U.S.C. § 2072; 28 U.S.C. § 2111.

The following is a list of provisions of the United States Constitution involved in this appeal, all of which are reproduced in Appendix E: Fifth Amendment, Sixth Amendment, Fourteenth Amendment.

STATEMENT OF THE CASE

Petitioner was charged as follows in a nine count indictment: Counts 1 and 2, 18 U.S.C. § 1027, making a

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false statement on October 16, 1986 on each of two 1985 IRS 5500-C forms; Count 3, 18 U.S.C. § 1014, making a false statement on November 12, 1987 to National Bank of Commerce ("NBC") to obtain a loan; Count 4, 18 U.S.C. § 664 on February 10, 1988, embezzling pension plan funds; Count 5, 18 U.S.C. § 664 on September 21, 1988 embezzling pension plan funds; Count 6, 18 U.S.C. § 1014 on December 6, 1988 making a false statement to NBC to obtain a loan; Counts 7 and 8, 18 U.S.C. § 1027, making false statements on each of two 1988 IRS 5500-C forms; Count 9, 18 U.S.C. § 664 on December 29, 1989 embezzling pension plan funds.

Petitioner made a motion for acquittal at the conclusion of the prosecution case, which was denied. Petitioner did not put on evidence and again moved for acquittal, which was denied. He was acquitted on Count 4 and convicted on the other counts. Petitioner renewed his motion for acquittal and moved alternatively for a new trial, which was denied. Petitioner filed a second motion for new trial citing newly discovered evidence and *Brady* violations, which was also denied. Through combining pre-guidelines and guidelines counts, Petitioner was sentenced to serve a total of eight years and ten months confinement and to pay restitution of $690,000.00 to the Pension Benefit Guaranty Corporation.

Petitioner appealed to the Eleventh Circuit Court of Appeals. In addition to raising on appeal the issue of the insufficiency of the evidence, Petitioner raised a number of claims of violation of his Constitutional rights which required *per se* reversal of his conviction, including violation of the Equal Protection Clause through racial and gender discrimination in use of peremptory strikes in selection of the jury, erroneous denial of Petitioner's motion to recuse the judge, denial of a fair trial, and amend-

ment of the indictment at trial in violation of the Fifth Amendment.

The panel of the Eleventh Circuit hearing the appeal entered an order on March 30, 1994, affirming Petitioner's conviction on the sole authority of Eleventh Circuit Local Rule 36-1, which Rule reads as follows:

> "***Affirmance Without Opinion.*** **When the court determines that *any* of the following circumstances *exist:***
>
> **(a) judgment of the district court is based on findings that are not clearly erroneous;**
>
> **(b) *the evidence in support of a jury verdict is sufficient;***
>
> **(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;**
>
> **(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;**
>
> **(e) judgment has been entered without an error of law; and an opinion would have no precedential value, the judgment or order *may be affirmed* or enforced without opinion."** (emphasis supplied).

Petitioner on April 20, 1994, filed a petition for rehearing and a suggestion of *en banc* rehearing which pointed out that Rule 36-1 was a local rule which not only governs when a written opinion must be entered, but authorizes a substantive basis for affirming on appeal judgments and orders of the district courts. The Rule plainly states that if in the appeal of a criminal case a panel of the Eleventh Circuit determines nothing more than that the evidence is sufficient to support the jury verdict, it may affirm the district court judgments and orders, including appeals of

criminal convictions, such as this one, which raise claims of Constitutional violations requiring *per se* reversal.[1] Petitioner pointed out that the additional authority granted by the Rule to affirm on the substantiative basis provided by the Rule without writing an opinion is actually required where the panel affirms cases based solely on the sufficiency of the evidence to support the jury verdict since the panel could not write an opinion without disclosing that the panel was ignoring Constitutional claims requiring *per se* reversal.

The rehearing petition also pointed out the well known unwritten, but invariably enforced, rule in the Eleventh Circuit that no case disposed of by a panel under Rule 36-1 will be considered *en banc* and urged that the application of this unwritten rule would further deny Petitioner his Constitutional rights of Equal Protection and Due Process. On June 2, 1994, the requested rehearing was denied *en banc.*

REASONS FOR GRANTING THE WRIT

I.

THE CONVICTION WAS AFFIRMED WITHOUT WRITTEN OPINION CITING AS AUTHORITY ELEVENTH CIRCUIT LOCAL RULE 36-1, WHICH EMPOWERS PANELS TO AFFIRM CONVICTIONS BY DETERMINING ONLY THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT, EVEN THOUGH THE APPEAL ASSERTS CLAIMS OF CONSTITUTIONAL VIOLATIONS WHICH REQUIRE PER SE REVERSAL

A review of the history of Rule 36-1 establishes the present form of the Rule is the result of deliberate elimi-

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[1] The Rule applies to all cases, but will be analyzed in this Petition in terms of criminal cases.

nation of provisions from predecessors of the present Rule which provisions were placed there to prevent panels from affirming district court judgments, including criminal convictions, without a full and fair consideration of all the issues presented on appeal. In *N.L.R.B. v. Amalgamated Clothing Workers of America*, 430 F.2d 966 (5th Cir. 1970)[2], the court discussed its then Rule 21, which had been adopted about a year earlier.[3] It pointed out that because of the increased number of appeals, some rule was needed for screening individual appeals to decide which would receive written opinions, but that "safeguards" were required to "assure the proper handling of cases." *Id.* at 970. The "safeguard" in former Rule 21 was that the circumstances listed (1) through (4) as alternative grounds of affirmance had to be "dispositive" of the appeal under existing substantive law before the Rule could be applied to affirm a conviction:

> "As the Rule points out, its application depends upon the Court determining judicially 'that any one or more of the following circumstances [(1) through (4)] *exists and is dispositive.*" *Id.* at 971-972. (emphasis supplied).

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[2]The Eleventh Circuit adopted the substantive law of the Fifth Circuit as its substantive law. *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981).

[3]The text of Rule 21 was as follows: **"When the Court determines that any one or more of the following exists *and is dispositive of a matter submitted to the Court for decision:* (1) that a judgment of the district court is based on facts which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the Court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion."** (emphasis supplied).

The court warned judges against using Rule 21 to engage in "ill-considered or even arbitrary action by those having the awesome power of almost final review." *Id.*

After its split from the old Fifth Circuit, the Eleventh Circuit adopted Local Rule 25.[4] This form of the Rule substituted summary judgment findings as alternative circumstance (4) and moved the former circumstance (4), "that no error of law appears", from an alternative circumstance to an absolute requirement. The effect of the amendment of old Rule 21 by Rule 25 was to require that in *every case* the panel had to determine that no error of law appeared in the appeal *in addition to* its determination that one of the four alternative circumstances "exist". This coupling of the absolute requirement that the court determine that no errors of law "exist" with a determination that one of the four alternative circumstances "exist" insured a decision to affirm would be based on a full and fair consideration of the issues *dispositive* of the appeal under existing substantive law.

Rule 36-1 was effective July 1, 1987. The Eleventh Circuit deliberately uncoupled the previously required relationship between mere *existence* of any one of the alternative "circumstances" and the issues were *dispositive* of the appeal under substantive law so that under the present

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[4] Rule 25 stated: **"Affirmance Without Opinion: When the court determines that any of the following circumstances exist:**

(a) judgment of the district court is based on findings of fact that are not clearly erroneous:

(b) the evidence in support of a jury verdict is not insufficient:

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict or judgment on the pleadings is unsupported by substantial evidence on the record as a whole:

***and the court also determines that no error of law appears* and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion."** (emphasis supplied).

Rule the mere determination that any one of those alternative circumstances "exist" was enough to affirm, even if that circumstance was not dispositive of the appeal under the substantive law. The effect in criminal cases was to authorize a panel of the Eleventh Circuit to affirm merely by finding the evidence sufficient to support the jury verdict regardless of the existence of other errors, even Constitutional errors requiring *per se* reversal. The Rule in its present form authorizes what was prohibited under the earlier forms of the Rule. It represents a radical departure from the precedents of the Eleventh Circuit which prohibited using the local rule making power to establish substantive law.[5]

The Rule's language establishes that it does not relate only to when written opinions must be entered. This Court requires that court rules be given their "plain meaning." *Pavelic & Leflore v. Marvel Entertainment Group,* 493 U.S. 120, 110 S.Ct. 456, 458, 107 L.Ed.2d 438 (1989). "As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous." *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 111 S.Ct. 922, 928, 112 L.Ed. 2d 1140 (1991).

In *United States v. Steem,* 835 F.2d 732, 734-735 (10th Cir. 1987), the local rule authorized combining the merits of an appeal with post conviction bail proceedings so that the court could expeditiously resolve the entire appeal. It required, however, that the court's decision must be based on a review of the "entire record." The *en banc* Tenth Circuit upheld the validity of its rule, but granted

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[5] In *Bonner v. City of Prichard, Alabama,* 661 F.2d 1206, 1210-1211 (11th Cir. 1981), the Eleventh Circuit held: "Nor is our rule making power an appropriate vehicle for establishing a body of precedent . . . Neither [28 U.S.C. § 2071] or [Federal Rules of Appellate Procedure] addresses the establishment of substantive law by court rule . . . We consider it inappropriate to decide what this circuit's substantive law will be by any means other than judicial decision."

rehearing because the panel had affirmed without written opinion on less than the "entire record", holding that, "Counsel and litigants are entitled to rely upon the notion that this court will *precisely* follow its own rules in *every* case before it." *Id.* (emphasis supplied).

A panel of the Eleventh Circuit which "precisely" follows the language of the Rule is empowered to affirm criminal convictions in violation of the decisions of this Court mandating that certain Constitutional errors require *per se* reversal, regardless of whether the evidence is sufficient to support the jury verdict.

A comparison of the Rule to the rules of the other courts of appeals further makes clear that the Rule is a radical departure from and violation of authorized local rule making authority. Attached hereto as Appendix C are the "equivalent" rules from the other courts of appeals relating to disposition of appeals without written opinion. The majority of Circuits base their local written opinion rule, or its closest equivalent, solely on the determination of whether an opinion in the case will have precedential value. The Fifth, Eighth, and Eleventh Circuits list in their local rules specific circumstances in addition to precedential value as considerations for affirming criminal convictions. However, the rules of the Fifth and Eighth Circuits require that the listed circumstances not merely exist, but that they be *dispositive* of the issues presented on appeal. Only the Eleventh Circuit Rule empowers panels to affirm a criminal judgment of conviction based on the mere determination that the evidence in support of a jury verdict is sufficient, without regard to whether that circumstance is dispositive of the issues presented by the appeal under existing substantive law.

The result is that every Eleventh Circuit criminal appeal, regardless of the issues presented, including claims of violation of Constitutional rights which require *per se* reversal, is subject to a form of harmless error review

even though the errors affect "substantial rights". The Rule thus conflicts with and wrongfully expands harmless error review authorized by 28 U.S.C. § 2111 and Rule 52, Federal Rules of Criminal Procedure, that harmless error analysis does not apply to errors which "affect the substantial rights of the parties." Under Rule 36-1, however, *all* error is deemed harmless so long as the evidence is sufficient to support the jury verdict.

Rule 36-1 was effective July 1, 1987. *United States Code Service*, Court Rules, May 1993, Sum. Supp., p. 152. The provisions of 28 U.S.C. § 2071 at that time provided the general authorization for rule making by the federal courts.[6] This statute specifically prohibits courts of appeal from adopting a local rule inconsistent with Acts of Congress and the rules of practice and procedure adopted by the Supreme Court, including the Federal Rules of Criminal Procedure and 28 U.S.C. § 2111.

The Judicial Improvements and Access to Justice Act (Pub. L. 100-702) adopted in 1988 and made effective December 1, 1989, amended 28 U.S.C. § 2071. The 1988 amendment required all rules created by courts other than the Supreme Court to also conform to the requirements of 28 U.S.C. § 2072. The provisions of § 2072(b) state, "Such rules shall not abridge, enlarge, or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Rule 36-1 violates the prohibitions of this statute because it deprives criminal defendants who appeal their convictions to the Eleventh Circuit of substan-

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[6]The pre-amendment statute read: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

tiative Constitutional rights and of the substantive rights the *per se* reversal rule is intended to protect.[7]

The power of courts of appeal to formulate local rules through the exercise of the supervisory power allows federal courts to "within limits, formulate procedural rules not specifically required by the Constitution or the Congress," for the purposes of implementing a remedy for violation of recognized rights and to "preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury". *United States v. Hasting,* 461 U.S. 504, 505, 103 S.Ct. 1974, 1978, 76 L.Ed.2d 96 (1983). In *Thomas v. Arn,* 474 U.S. 140, 146, 106 S.Ct. 466, 470, 88 L.Ed.2d 435 (1985), this Court held, citing *United States v. Payner,* 447 U.S. 727, 737, 100 S.Ct. 2439, 2447, 65 L.Ed.2d 468 (1980), that, "Even a sensible and efficient use of the supervisory power, however, is invalid if it conflicts with constitutional or statutory provisions. A contrary result 'would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.'" *Arn,* 474 U.S. at 148, 106 S.Ct. at 471.

In *Bank of Nova Scotia v. United States,* 487 U.S. 251, 254, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988), this Court spe-

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[7]The 1988 amendment to 28 U.S.C. § 331, effective December 1, 1988, provides that: "The Judicial Conference shall review rules prescribed under section 2071 of this title by the courts, other than the Supreme Court and the district courts, for consistency with Federal law. The Judicial Conference may modify or abrogate any such rule so reviewed found inconsistent in the course of such review." In its meeting on March 14, 1989, the Judicial Conference delegated to the Committee on Rules of Practice and Procedure its authority under 28 U.S.C. § 331 to review local appellate court rules, but retained the authority to modify or abrogate any local appellate rule. *Reports Of The Proceedings Of The Judicial Conference Of The United States Held In Washington, D.C. March 14, 1989 and September 20, 1989,* pp. 32-33. Counsel has been unable to locate through June of 1994 any report to the Judicial Conference on Local Rules.

cifically held that "a federal court may not invoke supervisory power *to circumvent the harmless error inquiry prescribed by Federal Rule of Criminal Procedure 52(1).*" (emphasis supplied). This Court held that, "The balance struck by the Rule between societal costs and the rights of the accused may not be casually overlooked 'because a court has elected to analyze the question under the supervisory power.'" *Id.* at 255, 106 S.Ct. at 2373-2374. Likewise, in *Hasting, supra,* this Court reversed an exercise of the supervisory power where it was used in such a way as to conflict with the harmless error rule.

Rule 36-1 must be declared unconstitutional and void by this Court because (1) it violates the Due Process and Equal Protection clauses of the Constitution; (2) it violates the provisions of 23 U.S.C. §§ 2071, 2072, and 2111; (3) it is in direct conflict with Rule 52, Federal Rules of Criminal Procedure; and (4) it exceeds the limits of the supervisory power of courts of appeal as defined and limited by the decisions of this Court. The exercise of the supervisory power of this Court is required.

Reliance solely on Rule 36-1 to affirm Petitioner's conviction requires the case must be reversed and remanded for a full and fair consideration of the issues presented and for a decision to be reached based on the Constitutional and substantive law governing those issues.

Moreover, Rule 36-1 *as applied in this case* violates the Due Process and Equal Protection Clauses and the rules and statutes set out above. There were very substantial claims of violations of Petitioner's Constitutional rights presented to the Eleventh Circuit panel by this appeal and a written opinion deciding those claims would have great precedential value. Chief Judge Brown in the *NLRB v. Amalgamated Clothing Workers* case, *supra,* clearly warned against what has happened in this case:

> "The Court recognizes that it must — the word is must — never apply the Rule to avoid making a difficult or troublesome decision or to conceal divisive or disturbing issues. This means that while Rule 21 should make a real contribution toward the goal of avoiding delays which can often amount to a denial of justice, it must be sparingly used." *Id.* at 972.

An extended discussion appears below of just two of the Constitutional claims requiring *per se* reversal: (1) the erroneous failure of the district judge to sustain Petitioner's objections under the *Batson* doctrine to the prosecution peremptorily striking venire persons on the basis of their race and gender; and (2) the erroneous denial of Petitioner's motion to recuse the trial judge. Two others have been briefed and attached to a motion for leave to supplement this petition. Space limitations do not permit fully briefing and arguing those issues herein.

II.

THERE WAS RACE AND GENDER DISCRIMINATION IN THE USE OF PEREMPTORY CHALLENGES

There were three blacks on the venire, Mr. McArthur, a self employed entertainer who had just concluded a recording contract with Capital records and a high school graduate with one and a half years additional education in electronic engineering; Ms. Chatman, who was employed by a university and had two years of college education; and Mr. Edwards, an elderly retired foundry worker. The prosecutors peremptorily struck Mr. McArthur and Ms. Chatman, leaving Mr. Edwards as the only black juror.

Petitioner made a *Batson* objection to the peremptory challenge of Mr. McArthur and offered the *prima facie* showing that the jury was being struck at a time of great

tension between the U.S. Attorney's Office and the Alabama black community because of claims the U.S. Attorney was discriminating against black elected officials through its criminal investigation and prosecution activities. While the jury in this case was being selected, black pickets in front of the courthouse charged the U.S. Attorney with racial discrimination. In order to get into the courthouse, the prospective jurors had to walk past and through these pickets. Area news media were providing extensive coverage.

The trial judge ruled this was not a sufficient *Batson prima facie* showing, but had the prosecution state its reasons for striking McArthur. The *senior prosecutor* stated, "He's a self-employed entertainer and recording artist and he's traveled around. He has been to California." This "reason" merely repeated what McArthur had said on *voir dire* without relating that information to anything. Moreover, it was irrational. *United States v. Alcantor*, 897 F.2d 436, 438 (9th Cir. 1990) (claims about a juror, though true, may be so irrational as to be a mere pretext). It failed as a matter of law to meet the *Batson* requirements of reasonableness and specificity and certainly did not "adequately explain the racial exclusion." Apparently sensing the inadequacy of this "reason", the *junior prosecutor* tried to fill the breach by stating, " . . . he said he was rescheduled to be out of town in February and March . . . and he may be likely to pay more attention to what he is going to be doing than his services as a juror." The second "reason" advanced by the *junior prosecutor* bore no relationship to the *senior prosecutor's* representation. Yet, the district judge made no inquiry as to which reason motivated the peremptory strike before overruling Petitioner's *Batson* objection.

In any event, the junior prosecutor's "reason" did not articulate racially neutral selection criteria because whites with the same articulated attribute were not

struck, even though the prosecution did not even use one of its peremptory challenges. Four venire persons, all white except Mr. McArthur, asked to be excused for what each considered pressing business reasons. The prosecutors left two of those whites on the jury, although they did not use one of their peremptory challenges.

The court made no inquiry, held no hearing, and received no evidence as to why the alledged attributes applied to peremptorily strike Mr. McArthur were not applied to whites with the same attributes. No explanation was offered to explain why Mr. McArthur, as opposed to the whites with the same attributes, would be more "likely" to have his mind on business than his jury service. The district court nevertheless accepted the prosecution's "reasons" as race-neutral and overruled Petitioner's *Batson* objections. Petitioner repeatedly pointed out to the district court that the junior prosecutor's articulated "reason" applied to whites who were not struck.

Petitioner made a *Batson* objection to the prosecution's peremptory strike of Ms. Chatman, making the same *prima facie* showing and adding that this was the second black struck out of three on the venire. The court again ruled Petitioner's *prima facie* case showing was inadequate, but again directed the prosecutors to state their reasons. The prosecutors stated:

> "Well, Judge, these — we were tendered four names as alternates, and each of us strikes one. And appraising the four people who were listed on there Mrs. Chatman is the person who has the least amount of experience or — in the business field, or certainly a supervisory position."

The other three alternates were all white males. The court ruled this was not a race-neutral reason for striking Ms. Chatman, but overruled Petitioner's objection on the following basis:

> "You must recognize that when they are striking for alternates, they are choosing from four people. *While they may not have given me a reason for getting rid of Mrs. Chatman, they have given me reasons for why they would prefer the others over her.* I think that's a nondiscriminatory — legitimate, nondiscriminatory reason." (emphasis supplied).

What difference does it make under *Batson* jurisprudence whether the prosecution was choosing one juror to strike from four or six jurors to strike from forty? The prosecution's clearly stated preference for white males over a black female because of allegedly greater business and supervisory experience of the white males is not race-neutral as a matter of law. The undeniable truth is that because of the race and gender discrimination throughout the history of this country, and especially in Alabama, black females have been barred from obtaining business and supervisory experience on any basis remotely resembling the vastly greater opportunity of white males to obtain such experience. With exceptions too few to be worthy of consideration, *every* black female could be struck on this basis in comparison to white males. Moreover, there was no showing as to the relationship, if any, supervisory or business experience of the type manifested by these white males had to jury service in this case. One was a retired Army recruiting sergeant, one a salesman, and one a farm manager. If there was any relationship between these experiences and the issues in the case, the prosecution did not articulate them.

Even if the prosecutors had really been interested in having jurors with business and supervisory experience, they applied standards to Ms. Chatman they did not apply to the whites. The prosecution, even though it had an unused peremptory strike, left on the jury whites with far less education than Ms. Chatman and Mr. McArthur and

with no meaningful business or supervisory experience: (1) a laborer with a high school education; (2) a stock room clerk; (3) a dental office employee with a high school education; (4) a postal carrier and former school bus driver with a high school education; (5) a retired laborer with a fourth grade education; (6) a secretary with a high school education. The court made no inquiry, held no hearing, and received no evidence as to the reasons, if any, the prosecution did not strike any of these whites, even though the attribute alleged as a race-neutral reason for striking Ms. Chatman applied with greater force to them than to Ms. Chatman.

Equally instructive as to the discriminatory intent of the prosecution are the whites with significant supervisory and business experience which the prosecution did peremptorily strike — Mr. Brinson owned a lumber business; Ms. Pendergrass was a salesperson with 5 years experience and a college degree; and Mr. Rice was a school teacher and principal with 20 years management experience and BA and MA degrees. The prosecution not only failed to peremptorily strike a retired laborer with a fourth grade education, but successfully opposed Petitioner's effort to challenge him for cause due to his poor hearing. Its determination to keep him as contrasted to its determination to get rid of Mr. McArthur and Ms. Chatman is simply unexplainable by non-racial reasons. Mr. McArthur and Ms. Chatman by any rational standard possessed superior juror qualifications to the many whites not struck.

Petitioner repeatedly brought to the attention of the court that the alleged "reasons" for striking blacks applied equally to whites who were not struck. When Mr. McArthur was struck, the following exchange took place:

> "[Petitioner]: . . . there are other persons that had business that were white that would carry them to other places, and those persons are

> now on the jury that passed through the striking process and have not been stricken.
>
> The Court: Well, I have made my ruling. I think that's a sufficient, nondiscriminatory reason."

When Ms. Chatman was struck, Petitioner objected as follows to the prosecution's alleged reason:

> "[Petitioner]: the only black that has been allowed to pass on this jury has been an elderly gentleman, who clearly the U. S. Attorney doesn't believe will be a significant factor in the decision. So, the fact remains that the result here is that these two people have been struck for ostensible reasons which apply to many other people who have been passed because they are white, you know."

The district judge ignored these objections and refused to make any demand on the prosecution to explain the discrepancy.

The Equal Protection Clause prohibits any party in any judicial proceeding, criminal or civil, from exercising peremptory challenges based on the race of the person challenged. *Batson v. Kentucky*, 476 U.S. 79, 98, 106 S.Ct. 1712, 1723, 90 L.Ed.2d 69 (1989); *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 1373, 113 L.Ed.2d 411 (1991); *Edmondson v. Leesville Concrete Company*, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); *Georgia v. McCollum*, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992). The prohibition is absolute and requires *per se* reversal if only one black juror is struck on the basis of race, even though others are seated. *Batson*, 476 U.S. at 99 n. 22, 106 S.Ct. at 1724 n. 22; *United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986) ("Above all, the district court should bear in mind that the command of *Batson* is to *eliminate*, not merely to *minimize*, racial discrimination in jury selection.") (emphasis supplied).

Batson objections are resolved in three steps. *Batson*, 476 U.S. at 93-95 and n. 18, 106 S.Ct. at 1721-1722 and n. 18: (1) Petitioner makes a *prima facie* showing of relevant facts giving rise to an inference of discriminatory purpose; (2) the "burden shifts" to the prosecution to show a race neutral reason for striking the juror in question; (3) if the prosecution states a race-neutral reason meeting the *Batson* requirements, the trial court then determines if Petitioner has carried his burden of showing purposeful discrimination.

Defendant's *prima facie* showing may rely on the fact peremptory challenges provide an opportunity for discrimination to those so inclined and then proffer "any other relevant circumstances" which raise an inference of purposeful discrimination. *Batson*, 476 U.S. at 98, 106 S.Ct. at 1723; *Hernandez v. New York*, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991). However, the *prima facie* requirement "drops out" once the judge directs the prosecution to state a race-neutral reason and the procedure moves to the next stage:

> "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the Petitioner has made out a *prima facie* showing becomes moot." *Hernandez*, 111 S.Ct. at 1866.

Once the burden shifts to the prosecution, *Batson* imposes requirements and prohibitions on prosecutors as to the burden of showing a race-neutral reason. The reason given must be "reasonably clear and specific" and must "adequately explain the racial exclusion." *Batson*, 476 U.S. at 98 n. 20, 106 S.Ct. at 1724 n. 20. That is, it must demonstrate that permissible racially neutral criteria have produced a "monochromatic result." *Id.* 476 U.S.

at 94, 106 S.Ct. at 1721. The burden cannot be met by a general assertion they did not discriminate or properly performed their duties, *Id.*, or an affirmation of good faith. *Id.* 476 U.S. at 98, 106 S.Ct. at 1723-1724. *Batson* warns that if these rules are not enforced, "the Equal Protection Clause 'would be but a vain and illusory requirement.'". *Id.* Only after the prosecution has met this burden does the trial court decide if Petitioner has established purposeful discrimination. *Id.* 476 U.S. at 98 and n. 21, 106 S.Ct. at 1724 and n. 21.

In evaluating a prosecutor's effort to rebut a *prima facie* showing, one very relevant consideration is whether they challenged similarly situated white jurors on identical or comparable grounds. *United States v. Thompson,* 827 F.2d 1254, 1260 (9th Cir. 1987). *See also Gamble v. State,* 257 Ga. 325, 357 S.E.2d 792 (1987); *People v. Hall,* 35 Cal. 3d 161, 197 Cal. Rptr. 71, 76 (1983) (disparate treatment of black and white jurors similarly situated is "strongly suggestive of bias"); *State v. Gilmore,* 103 N.J. 508, 511 A.2d 1150, 1168 (1986) (failure to challenge white jurors who by his own criteria ought to have been removed is highly probative in determining whether the prima facie case had been rebutted).

Applying these rules to this case, reversal is mandated. The judge erred as a matter of law in finding that the prosecution had stated race neutral reasons for the challenges of Mr. McArthur and Ms. Chatman. Moreover, even if viewed as factual determinations, his *Batson* rulings are not due the deference "ordinarily" accorded such rulings because there is nothing in the record to support them and the record clearly shows them to be erroneous. The rule in the Eleventh Circuit is that where the record lacks substantial evidence to support a district court's findings, they are clearly erroneous. *Thelma C. Raley, Inc. v. Kleppe,* 867 F.2d 1326, 1328 (11th Cir. 1989)

and *Trust Company Bank v. MGM/UA Entertainment Company*, 772 F.2d 740, 746 (11th Cir. 1985).

The prosecution's motivation in this case to avoid black jurors because of their race is unusually clear. The office of the U. S. Attorney prosecuting the case was under direct attack for racial discrimination in its prosecution activities by black pickets marching in front of the courthouse so that the venire persons entering the courthouse had to walk through the pickets. Moreover, area news media had carried many stories on the charges of racial discrimination against the U. S. Attorney's office. The ruling of the trial judge that these circumstances did not give rise to an inference of discriminatory intent by the prosecution is clearly erroneous.

Nevertheless, the trial judge did require the prosecution to state its race neutral reasons for the peremptory challenges and ruled these reasons to be race neutral. Under *Hernandez*, *supra*, the question of whether Petitioner had made a *Batson prima facie* showing became moot and dropped out of the *Batson* analysis once they attempted to state a race neutral reason and the judge ruled. The only "reasons" which they articulated were based on applying attributes to blacks not applied to whites. There was no presentation of any evidence of any difference in the degree to which the blacks and whites manifested the comparable attributes and no effort was made by the prosecution to make any explanation for their double standard, even *after* Petitioner repeatedly pointed out to the judge that the alleged race-neutral reasons were based on attributes applied to blacks and not to whites. *United States v. Alston*, *supra*, at 1367 n. 5 ("The attributes relied upon by the prosecutor in striking potential jurors are not always easily compared, however, and often *require* an evaluation of the degree to which the prospective juror manifests the stated attribute.") (emphasis supplied). The record lacks *any* evidence to sup-

port the court's decisions, but rather shows them to be clearly erroneous.

For example, in the case of Ms. Chatman the judge admitted the prosecution had failed to state a race-neutral reason for striking her, but held that *Batson* allowed the prosecution to *prefer* white males as jurors to Ms. Chatman because of an attribute, business and supervisory experience, which historical race and gender discrimination in this country has denied to black females on the same terms as white males.

J.E.B. v. Alabama ex rel. T.B., 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) held that peremptory challenges based solely on gender violated the Equal Protection Clause: "Discrimination in jury selection, whether based on race as on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." *Id.* at 104. *J.E.B.* emphasized that, "All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination." *Id.* at 105. The Court prohibited the exclusion of "even one juror for impermissible reasons . . . " *Id.* at 105, n. 13.

The prosecution "reason" for striking Ms. Chatman was a gender based classification. This Court emphasized in *J.E.B.* that this country has had a long and unfortunate history of sex discrimination and that this history warrants "the heightened scrutiny we afford all gender-based classifications today." In those instances where gender based classifications are used by state prosecutors, this Court requires " 'an exceedingly persuasive justification in order to survive constitutional scrutiny.' " *Id.* at 101-102.

The judge errd in finding the prosecution had explained away its racial discrimination. He further erred

in accepting an explanation which combined the economic impact of racial and gender discrimination by citing the result of that discrimination, exclusion from supervisory and meaningful business experience, as a reason for preferring white males over a black female.

This Court pointed out in *J.E.B.* that, "[B]ecause gender and race are overlapping categories, gender can be used as a pretext for racial discrimination." *Id.* at 107. In fact, "The temptation to use gender as a pretext for racial discrimination may explain why the majority of the lower court decisions extending *Batson* to gender involve the use of peremptory challenges to remove *minority women.*" *Id.* at n.18. The relationship between race and gender in the area of peremptory challenges recognized by this Court can only mean that minority women have been a special target of discrimination because of their race *and* their gender. The peremptory challenge of minority women should prima facie require both a race neutral and gender neutral explanation by the party exercising the peremptory challenge. Moreover, where, as here, the attempted race and gender neutral explanation is based on a quality, skill, or experience factor in comparison to white males which minority women have been prevented from acquiring on the same basis as white males because of historical minority and gender discrimination, the attempted race and gender explanation must be held to fail *as a matter of law.*

In this case, the prosecution failed to articulate either a race or gender neutral reason for peremptorily challenging Ms. Chatman, but instead gave as its reason one of the results of historical race and gender discrimination against minority women. The prosecution's attempted explanation failed as a matter of law.

This case must be reversed. *Vasquez v. Hillery,* 474 U.S. 254, 263-264, 106 S.Ct. 617, 623-624, 88 L.Ed.2d 598 (1986) ("[D]iscrimination in jury selection undermines

the structural integrity of the criminal tribunal itself and is not subject to harmless error review."). Alternatively, this case should be remanded to the district court to receive evidence and make findings as to the prosecution's race-neutral reasons, if any, as to why comparable attributes were applied to blacks and not to whites in the peremptory challenge process.

The Eleventh Circuit panel's application of Rule 36-1 to this appeal lacked any justification in view of the *Batson* issue alone. In the first place, the panel should have reversed the conviction because the judge erred in overruling Petitioner's objections. In the second place, the appeal presented to the panel a question of first impression in the Eleventh Circuit. In *United States v. Bennett*, 928 F.2d 1548, 1550 n. 1 (11th Cir. 1991), the court recognized that the Eleventh Circuit had not decided the question of whether a district judge is required to hold a hearing on the court's own initiative where in response to a *Batson* objection the attempted race-neutral explanation of a peremptory strike is based on attributes of blacks shared by whites who are not struck or whether the objecting party must formally request such a hearing and the court formally deny such a hearing for there to be error. This case squarely presented that question to the panel and the panel ignored it, choosing instead to unconstitutionally affirm under the sufficiency of the evidence standard made possible by the Rule.

III.

THE DISTRICT JUDGE SHOULD HAVE RECUSED HIMSELF

Petitioner, a member of the bar of this Court for 25 years, acted as his own attorney after the district judge promised him at a hearing held for the purpose of determining whether Petitioner would represent himself, "I'll

treat you just like any other lawyer, any other defendant". This representation was false. When Petitioner arrived at the courtroom on the first day of trial, before Petitioner had spoken a word, the district judge called a meeting in his chambers and threatened him with imprisonment based on long standing bias and prejudice of the judge against Petitioner because of the judge's opinion of the trial tactics Petitioner had employed in other cases over his 29 year career as a trial lawyer:

> "I've been nice to this point, but we are not going to try those civil cases. And if you try. it, *you'll get some time in the county jail without the benefit of a conviction* . . . I walk in the courtroom this morning and *see a truckload* of documents in there two weeks before the defendant is even going to put on evidence." (emphasis supplied).

The district judge stated his long standing bias and prejudice against Petitioner as the reason for this threat:

> " . . . my observation of everything you ever do in any case is simply to try to overwhelm the court, overwhelm the other side with paper, and that's not going to happen in this case . . . You've done it in *every civil case* I've ever seen you in . . . I am not going to allow you to turn this into some sort of circus." (emphasis supplied).

The judge emphasized the seriousness of the imprisonment threat by stating the warning was for the purpose of complying with the notice requirements for imposing criminal contempt.[8]

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[8] "The Court: I will say this: I said something about jail, because as I understand summary contempt, I am required to advise you in advance what I will and will not tolerate before I can impose a summary contempt — or punishment for a summary contempt violation."

The "civil cases" referred to by the judge were a mirror image of the criminal charges and had been resolved by a settlement favorable to Petitioner. The prosecution, not Petitioner, gave notice on October 10, November 18 and December 17, 1991, that it would introduce documents from the civil litigation and advised Petitioner that numerous civil litigation documents might be relevant to preparation of his defense.[9] The district judge at a pretrial conference in December of 1991, recognized the relevance of civil litigation issues and documents to this case: "Now, having — you brought up the civil cases, and I understand there's a great deal there that may be relevant to some issue in this case . . . *And I'm not telling you to stay away from them* . . . " (emphasis supplied). Yet, the judge reversed this position without warning on the first morning of the trial severely prejudicing Petitioner's defense.

The judge's bias and prejudice was so strong it caused him to overlook the obvious fact that Petitioner would immediately begin introducing evidence in cross-examination of prosecution witnesses, not two weeks after the trial started. Moreover, the order of prosecution witnesses was unknown so Petitioner had to have documents

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[9]On October 10, 1991, thirteen days after the indictment, the prosecution put the defendant on notice in its' "Response To Discovery Request" required by the defendant's Rule 16, Fed.R.Cr.P., request for production of documents that: "The defendant is hereby put on notice that various documents which are of record in the United States District Court for the Northern District Of Alabama which relate to any civil litigation involving the defendant any (sic) any other party within the past three years and that various documents which are of record in the United States Bankruptcy Court for the Northern District of Alabama involving the Lattimer-Stevens Company and the Rutledge Industrial Corporation, also known as Acme, Inc., may be material to the preparation of the defendant's defense and may be used by the government, where relevant, as evidence in chief at trial."

available to cross examine whoever took the stand whenever they took the stand. The court made no admonition to the prosecution concerning the civil litigation, despite the fact that it was the prosecution, not the Petitioner, which gave official notice that it would introduce documents from the civil litigation in the trial and that in preparing his defense he had best be prepared to defend against the unspecified civil litigation documents. Petitioner was prejudiced again as he labored under a prohibition not imposed on the prosecutor. All of the documents introduced by the prosecution at the trial were documents from the civil litigation.

The result was that Petitioner, acting *pro se* in reliance on the judge's false promise of impartiality, was now surprised by learning for the first time on the first morning of the trial (1) of the judge's bias and prejudice against him and (2) of the reversal of the judge's previous ruling regarding the relevance of the civil litigation documents. Petitioner had prepared his defense in reliance on these factors, reinforced by the notices given by the prosecution, and was now suddenly under threat of imprisonment if he proceeded with that defense.

Petitioner immediately moved to recuse the judge, expressing his complete surprise at the judge's previously undisclosed bias and prejudice against him and specifically alleging that it would be 'impossible" for the judge to provide a fair trial.[10] This motion caused the judge to

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[10] "[Petitioner] : It was not only — it was not only what the Court said, which I must admit that the remark about possibly jailing me if I went into areas of evidence the Court did not want me to go in, has had a serious chilling effect on my presentation — but it wasn't only, your Honor, the remarks that were made and their reference to our past history or past relationship, it was the intensity of feeling and emotion which I observed in the Court as those remarks were made which truly took me aback. *I hadn't until this — until that session, no idea that the Court had those feelings about me or concerning me.* And it was

react personally and to disclose for the first time yet another long held bias and prejudice against Petitioner. "And I would add this: That in this and other cases, it is a practice of yours to engage in personal attacks upon opponents. I don't know if that's — if you have shifted that personal attack toward me or whatever."

It was clear to Petitioner and should have been clear to the judge that these prejudices against Petitioner made "fair judgment impossible" in this case. These prejudices, particularly the belief that Petitioner routinely made bad faith offers of evidence and motions just to overwhelm the court and opposing counsel and routinely made unjustified personal attacks on opponents, would color and influence the judge's view of every question Petitioner asked, every motion he made, and call into question every action taken by Petitioner in trying to defend himself. In fact, as will be shown below, this is exactly what did happen in the trial of this case.

In *Liteky v. United States*, 127 L.Ed.2d 474 (1994), this Court in interpreting the federal judicial recusal statutes, which case was before the Court on certiorari from the Eleventh Circuit, held that judicial remarks during the course of a trial which are critical, disapproving, or hostile to counsel, parties, or their case "may" support a bias or partiality challenge "if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of antagonism as to make *fair judgment impossible.*" (emphasis original). The pendency of this case before this Court was called to the attention of the Eleventh Circuit panel by Petitioner. The *Liteky* opinion was entered on March 7, 1994 and the

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the intensity of the thing, which is — of course, unfortunately, doesn't appear in the record. But if the Court truly has those feelings as expressed, it would seem to me *impossible* for the Court or me or Mr. Henry or anyone else to overcome them sufficiently to provide an impartial trial." (emphasis supplied).

panel affirmed this case without opinion under Rule 36-1 on March 30, 1994.

Petitioner specifically stated to the district court as a part of his recusal motion that the bias and prejudice of the judge made it "impossible" for the judge to "provide an impartial trial." The Petitioner thus squarely presented to the Eleventh Circuit a recusal motion based on the precise standard this Court subsequently announced in *Liteky*. This Court made clear in *Liteky* that it would not attempt to describe "in complete detail" the consequences of the "extrajudicial source *factor*" in recusal jurisprudence. The instant appeal, therefore, squarely presented to the panel the questions of (1) what constitutes an "extrajudicial source" under *Liteky*, and (2) what degree of conduct or remarks is deemed to make "fair judgment impossible". Clearly, a written opinion on these squarely presented issues would have had significant precedential value as counsel and the district courts seek to apply *Litkey*. The application of Rule 36-1 was erroneous since the panel could not have found in this case on any reasonable basis that a written opinion would have no precedential value, the second required condition for the application of Rule 36-1.

But, aside from these considerations, the judge specifically promised Petitioner that if he defended himself in this case, he would treat Petitioner "just like every other lawyer, every other defendant." This representation was simply not true. The judge knew when he made this representation that he had strong bias and prejudice against Petitioner. The judge's disclosure of those prejudices at the hearing at which Petitioner made the decision to defend himself would have avoided the tragedy of this unfair trial since neither Petitioner or anyone else in their right mind would have tried to defend themselves before this judge had he known the judge's true bias and prejudice. Counsel has been unable to locate a similar

fact situation in the reported cases. Surely, this Court will not tolerate such judicial conduct and will exercise its supervisory power to correct it.

The panel simply relied on the authority of Rule 36-1 to affirm this conviction because it determined the evidence was sufficient to support the jury verdict. This case must be reversed.

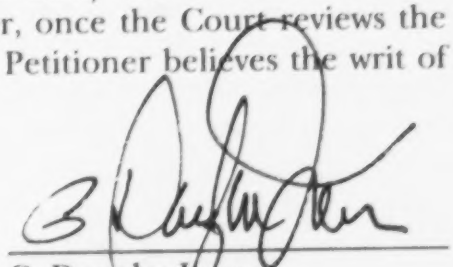
CONCLUSION

The panel relied on Rule 36-1 in affirming Petitioner's conviction. That Rule is Constitutionally defective because it authorizes the affirmance of a criminal conviction where the panel determines only that the evidence is sufficient to support the jury verdict, even in cases, such as this one, which require *per se* reversal without regard to the sufficiency of the evidence to support the jury verdict. No other court of appeals has such a rule. Instead, nine of the other circuits have elected to make the question of when an appeal is to be disposed of by written opinion and when not, turn on the question of the value of such an opinion as precedent and leave the decision as to affirmance or reversal to be decided under existing substantive law. Two other circuits have rules which contain internal authority to affirm if certain circumstances exist, but only if those circumstances are dispositive under existing substantive law of the issues raised on appeal. Only the Eleventh Circuit has chosen to adopt a local rule which subordinates all error to only one consideration, whether the evidence is sufficient to support the jury verdict.

The Eleventh Circuit procedure of automatically denying *en banc* review to Rule 36-1 cases has the effect of denying appellants in the Eleventh Circuit access to other judges who might insist that their cases require further consideration, an opportunity which is not de-

nied to appellants in the other circuits. This procedure coupled with Rule 36-1 means that when a panel of the Eleventh Circuit chooses to affirm a case merely because it deems the evidence is sufficient to support the jury verdict, regardless of the nature of the errors asserted on appeal, the opportunity for a full and fair consideration of the issues is simply not available. This Court must set aside Rule 36-1 as an unconstitutional and unlawful exercise of the Eleventh Circuit's local rule making power and reverse this case.

This appeal presents for decision substantial claims of deprivation of Constitutional rights which require *per se* reversal of this conviction. The Eleventh Circuit panel affirmed and did not write an opinion. This absence of an opinion is, of course, normally the "kiss of death" for a criminal appeal. However, once the Court reviews the circumstances of this case, Petitioner believes the writ of certiorari will issue.



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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

WILLIAM EUGENE RUTLEDGE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE OF PETITION FOR WRIT OF CERTIORARI

This is to certify pursuant to Rule 29.2, 29.3 and 29.4 that three copies of the Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit by United States Mail, first class postage prepaid and properly addressed to Claude Harris, United States Attorney, and Herbert H. Henry, III and John Pat Meadows, Assistant United States Attorneys, 1800 First Avenue North, Birmingham, AL 35203 and also that on this date that forty copies and the filing fee have been deposited in the United States Mail, first class postage prepaid to the Clerk of the Court.

This the 31st day of August, 1994.

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Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-6548

D.C. Docket No. CR-91-197-S

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

WILLIAM EUGENE RUTLEDGE,

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Alabama

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(March 30, 1994)

Before BIRCH, Circuit Judge, CLARK, Senior Circuit Judge, and HOEVELER*, Senior District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36.1

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*Honorable William M. Hoeveler, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-6548

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM EUGENE RUTLEDGE,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: BIRCH, Circuit Judge, CLARK, Senior Circuit Judge, and HOEVELER*, Senior District Judge

PER CURIAM:

(√) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be

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*Honorable William M. Hoeveler, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ xxxxxx Birch
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

APPENDIX C

District or Columbia Circuit Rule 14(C):

"(c) Abbreviated Dispositions. This Court may, *while according full consideration to the issues,* dispense with published opinions where the issues occasion no need therefor, and confine its action to such abbreviated disposition as it may deem appropriate . . . "

First Circuit Rule 36.1:

"The volume of filings is such that the court cannot dispose of each case by opinion. Rather it makes a choice, reasonably accommodated to the particular case, whether to use an order, memorandum and order, or opinion. An opinion is used when the decision calls for more than summary explanation . . . "

Second Circuit Rule 0.23:

"The demands of an expanding case load require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order."[1]

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[1]The interpretation of this rule by the Second Circuit further points to the difference between its rule on written opinions and that of the Eleventh Circuit. In *Furman v. United States*, 720 F. 2d 263, 265-266 (2nd Cir. 1983), the court stated concerning Rule 0.23: "[The Rule] contemplates that *prior to the decision to proceed by summary order* the panel will have considered the parties' claims, evaluated them in the light of existing precedent, reached a unanimous decision as to the out come of the appeal, and concluded unanimously that a formal written opinion would not enhance existing jurisprudence."

Third Circuit Internal Operating Procedure 5.1.2:[2]

"Memorandum Opinions: When the panel unanimously determines to affirm the judgment, order, or decision of the court under review, to dismiss an appeal, or to enforce or deny review of the order or decision of an administrative agency, and determines that a written opinion will have no precedential or institutional value, the opinion-writer may choose to write a memorandum opinion briefly setting forth the reasons supporting the court's decision as an alternative to preparation of a judgment order."

Fourth Circuit Internal Operating Procedure 36.3:[3]

"Summary Opinions. If all judges on a panel of the court agree following oral argument[4] that an opinion in a case would have no precedential value, and that summary disposition is otherwise appropriate, the court may decide the appeal by summary opinion. A summary opinion identifies that decision appealed from, sets forth the court's decision and the reasons or reasons therefor, and resolves any outstanding motions in the case. It does not discuss the facts or elaborate on the court's reasoning."

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[2]The Third Circuit does not have a formal local rule on written opinions.

[3]Same as preceding note.

[4]The only provision for the disposition of cases decided without oral argument is Rule 34(a), which states in relevant part, "If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument is not to be allowed, they may make any appropriate disposition, without oral argument, including but not limited to, affirmance or reversal." There is no reference to written opinions in connection with such cases.

Fifth Circuit Rule 47.6:

"When the Court determines that any one or more of the following circumstances exists *and is dispositive of a matter submitted to the Court for decision:* (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole, or (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant, *and the Court also determines that no reversible error of law appears* and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion." (emphasis supplied).

Sixth Circuit Rule 19:

"In those cases in which the decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition of the case may be made in open court following oral argument. A written judgment shall be signed and entered by the clerk in accordance with the decision of the panel from the bench. Counsel may obtain a copy of the audio recording of such decision from the bench, if available, upon the payment of the fee fixed for such service by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1913."[5]

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[5]Sixth Circuit Rule 9 and Internal Operating Procedure 18 provide for disposition of cases without oral argument, but do not refer to doing so without written opinion.

Seventh Circuit Rule 53:

"**(a) Policy.** It is the policy of the circuit to reduce the proliferation of published opinions.

(b) Publication. The court may dispose of an appeal by an order or by an opinion, which may be signed or *per curiam.* Orders shall not be published and opinions shall be published.

(c) Guidelines for Method or Disposition.

(1) Published Opinions. A published opinion will be filed when the decision

(i) establishes a new, or changes an existing rule of law;

(ii) involves an issue of continuing public interest;

(iii) criticizes or questions existing law;

(iv) constitutes a significant and non-duplicative contribution to legal literature

(A) by a historical review of law,

(B) by describing legislative history,

(C) by resolving or creating a conflict in the law;

(v) reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order; or

(vi) is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court.

(2) Unpublished orders. When the decision does not satisfy the criteria for publication, as stated above, it will be filed as an unpublished order. The order will ordinarily contain reasons for the judgment, but may not do so if the court has announced its decision and reasons from the bench.

A statement of facts may be omitted from the order or may not be complete or detailed.

(d) **Determination or Whether Disposition is to be by Order or Opinion.** (1) The determination to dispose of an appeal by unpublished order shall be made by a majority of the panel rendering the decision. (2) The requirement of a majority represents the policy of this circuit. Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish. (3) Any person may request by motion that a decision by unpublished order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for method of disposition set forth in this rule."

Eighth Circuit Rule 47B:

"A judgment or order appealed from may be affirmed or enforced without opinion if the court determines an opinion would have no precedential value and any one of the following circumstances *disposes of the matter submitted to the court for decision:*

(1) a judgment of the district court is based on findings of fact that are not clearly erroneous;

(2) the evidence in support of a jury verdict is not insufficient;

(3) the order of an administrative agency is supported by substantial evidence on the record as a whole; or

(4) no error of law appears." (emphasis supplied)

Ninth Circuit Rule 36-2:

"A written, reasoned disposition shall be designated as an OPINION[6] only if it:

(a) Establishes, alters, modifies, or clarifies a rule of law, or

(b) Calls attention to a rule of law which appears to have been generally overlooked, or

(c) Criticizes existing law, or

(d) Involves a legal or factual issue of unique interest or substantial public importance, or

(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

(f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or

(g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression."

Tenth Circuit Rule 36.1

"It is unnecessary for the court to write opinions in every case. The court may, in its discretion and without written opinion, enter either an order, "Affirmed", or an order and judgment disposing of the appeal or petition. Disposition without opinion does not mean the case is

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[6]Ninth Circuit Rule 36-1 defines the terms "Opinion", "Memorandum", and "Order", distinguishing between "Opinion" and "Memorandum" based on whether "the written, reasoned disposition" characteristic of both is to be published, an Opinion", or not, a Memorandum." Any other disposition is defined as an "Order."

considered unimportant. It does mean that the panel believes the case involves application of no new points of law that would make the decision of value as a precedent."

APPENDIX D

18 U.S.C. § 664. Theft or embezzlement from employee benefit plan

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974.

Added Pub.L. 87-420, § 17(a), Mar. 20, 1962, 76 Stat. 41, and amended Pub.L. 93-406, Title I, § 111(a)(2)(A), Sept. 2, 1974, 88 Stat. 851.

18 U.S.C. § 1027. False statements and concealment of facts in relation to documents required by the Employee Retirement Income Security Act of 1974

Whoever, in any document required by title I of the Employee Retirement Income Security Act of 1974 (as amended from time to time) to be published, or kept as part of the records of any employee welfare benefit plan or employee pension benefit plan, or certified to the administrator of any such plan, makes any false statement or representation of fact, knowing it to be false, or knowingly conceals, covers up, or fails to disclose any fact the disclosure of which is required by such title or is necessary to verify, explain, clarify or check for accuracy

and completeness any report required by such title to be published or any information required by such title to be certified, shall by fined not more than $10,000, or imprisoned not more than five years, or both.

Added Pub.L. 87-420, § 17(c), Mar. 20, 1962, 76 Stat. 42, and amended Pub.L. 93-406, Title I, § 111(a)(2)(B)(i), (ii), Sept. 2, 1974, 88 Stat. 851.

28 U.S.C. § 331. Judicial Conference of the United States

The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit to a conference at such time and place in the United States as he may designate. He shall preside at such conference which shall be known as the Judicial Conference of the United States. Special sessions of the Conference may be called by the Chief Justice at such times and places as he may designate.

The district judge to be summoned from each judicial circuit shall be chosen by the circuit and district judges of the circuit at the annual judicial conference of the circuit held pursuant to section 333 of this title and shall serve as a member of the conference for three successive years, except that in the year following the enactment of this amended section the judges in the first, fourth, seventh, and tenth circuits shall choose a district judge to serve for one year, the judges in the second, fifth, and eighth circuits shall choose a district judge to serve for two years and the judges in the third, sixth, ninth, and District of Columbia circuits shall choose a district judge to serve for three years.

If the chief judge of any circuit, the chief judge of the Court of International Trade, or the district judge cho-

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sen by the judges of the circuit is unable to attend, the Chief Justice may summon any other circuit or district judge from such circuit or any other judge of the Court of International Trade, as the case may be. Every judge summoned shall attend and, unless excused by the Chief Justice, shall remain throughout the sessions of the conference and advise as to the needs of his circuit or court and as to any matters in respect of which the administration of justice in the courts of the United States may be improved.

The Conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary. It shall also submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business. The Conference is authorized to exercise the authority provided in section 372(c) of this title as the Conference, or through a standing committee. If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all petitions for review shall be reviewed by that committee. The Conference or the standing committee may hold hearings, take sworn testimony, issue subpoenas and subpoenas duces tecum, and make necessary and appropriate orders in the exercise of its authority. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the Supreme Court or by the clerk of any court of appeals, at the direction of the Chief Justice or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or any officer or any agency thereof. The Conference may also prescribe and modify rules for the exercise of the authority provided

in section 372(c) of this title. All judicial officers and employees of the United States shall promptly carry into effect all orders of the Judicial Conference or the standing committee established pursuant to this section.

The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

The Judicial Conference shall review rules prescribed under section 2071 of this title by the courts, other than the Supreme Court and the district courts, for consistency with Federal law. The Judicial Conference may modify or abrogate any such rule so reviewed found inconsistent in the course of such a review.

The Attorney General shall, upon request of the Chief Justice, report to such Conference on matters relating to the business of the several courts of the United States, with particular reference to cases to which the United States is a party.

The Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.

June 25, 1948, c. 646, 62 Stat. 902; July 9, 1956, c. 517, § 1(d), 70 Stat. 497; Aug. 28, 1957, Pub.L. 85-202, 71 Stat. 476; July 11, 1958, Pub.L. 85-513, 72 Stat. 356; Sept. 19, 1961, Pub.L. 97-253, §§ 1, 2, 75 Stat. 521; Nov. 6, 1978, Pub.L. 95-598, Title II, § 208, 92 Stat. 2660; Oct. 15,

1980, Pub.L. 96-458, § 4, 94 Stat. 2040; Apr. 2, 1982, Pub.L. 97-164, Title I, § 111, 96 Stat. 29; Oct. 14, 1986, Pub.L. 99-466, § 1, 100 Stat. 1190; Nov. 19, 1988, Pub.L. 100-702, Title IV, § 402(b), 102 Stat. 4650.

28 U.S.C. § 1014. Loan and credit applications generally; renewals and discounts; crop insurance

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the depositions of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase

agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

June 25, 1948, c. 645, 62 Stat. 752; May 24, 1949, c. 139, § 21, 63 Stat. 92; July 26, 1956, c. 741, Title I, § 109, 70 Stat. 667; Aug. 21, 1958, Publ.L. 85-699, Title VII, § 705, 72 Stat 699; Aug. 18, 1959, Pub.L. 86-168, Title I, § 104(h), 73 Stat. 387; Oct. 4, 1961, Pub.L. 87-353, § 3(t), 75 Stat. 774; July 2, 1964, Pub.L. 88-353, § 5, 78 Stat. 269; Oct. 19, 1970, Pub.L. 91-468, § 7, 84 Stat. 1017; Dec. 31, 1970, Pub.L. 91-609, Title IX, § 915, 84 Stat. 1815.

28 U.S.C. § 1254(1).

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree

28 U.S.C. § 2071. Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and

shall have such effect on pending proceedings as the prescribing court may order.

(c)(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

(2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and make available to the public.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

(f) No rule may be prescribed by a district court other than under this section.

June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, §-102, 63 Stat. 104; Nov. 19, 1988, Pub.L. 100-702, Title IV, § 403(a)(1), 102 Stat. 4650.

28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe

a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Added Pub.L. 100-702, Title IV, § 401(a), Nov. 19, 1988, 102 Stat. 4648, and amended Pub.L. 101-650, Title III, § 315, Dec. 1, 1990, 104 Stat. 5115.

28 U.S.C. § 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Added May 24, 1949, c. 139, § 110, 63 Stat. 105.

APPENDIX E

Amendment V of the Constitution of the United States

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV of the Constitution of the United States

Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.